

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN MATTHEW MCCLAIN,

Defendant-Appellant.

UNPUBLISHED

October 13, 2005

No. 255816

Wayne Circuit Court

LC No. 03-012008-01

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). He was sentenced to 2 ½ to 15 years in prison. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that there was insufficient evidence to support his conviction. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

The elements of CSC III are (1) sexual penetration of another, (2) accomplished under certain aggravating circumstances, including force or coercion. *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000); MCL 750.520d(1)(b). Defendant was convicted of accomplishing penetration by concealment or surprise to overcome the victim. Concealment or surprise is a form of force or coercion under the CSC III statute, which incorporates definitions of force or coercion from the CSC I statute, MCL 750.520b. Concealment or surprise is listed under MCL 750.520b(1)(f)(v).

Defendant argues first that there was insufficient evidence of sexual penetration. The only witness to the incident was the victim, and her later medical examination did not reveal evidence that she was penetrated by defendant. He argues that her testimony alleging penetration was not credible, given that she may have been drinking at the time and given that there were inconsistencies in her descriptions of events. He argues that since her testimony was

the only evidence offered of penetration, the prosecutor failed to prove this element beyond a reasonable doubt.

Michigan law explicitly does not require corroboration of a victim's testimony in prosecutions for CSC III. MCL 750.520h. Further, in appeals challenging the sufficiency of the evidence, questions of witness credibility are left to the trier of fact, not the reviewing court. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Here, the trial judge found the victim's testimony credible, and it is not our role to disturb that finding. Therefore, the victim's testimony was sufficient proof that penetration occurred.

Second, defendant argues there was insufficient evidence of force or coercion through concealment or surprise. Defendant went into the bedroom where the victim was sleeping on her side. He lay down behind her, and when she felt the penetration she assumed it was her fiancé, who had previously been in the house. Neither of them said anything until the victim looked back and saw defendant. She then jumped up and yelled for him to leave the room. Defendant had met the victim several times before the incident, and defendant weighed significantly less than the victim's fiancé. Therefore he argues she was aware it was defendant in bed with her, that his identity was thus not concealed, and that she was silently consenting to sex with him.

The prosecutor does not need to negate every reasonable theory of innocence. *People v Nowak*, 462 Mich 392, 400; 614 NW2d 78 (2000). That the victim could have known it was defendant behind her does not negate her credible testimony that she thought it was her fiancé. In addition, CSC III does not require the prosecutor to prove lack of consent; it only requires sufficient evidence of force or coercion. *People v Jansson*, 116 Mich App 674, 683; 323 NW2d 508 (1982). In the instant case, the prosecutor needed only to prove there was sufficient evidence of concealment.

Neither the CSC I or CSC III statute defines "concealment," but the term was recently interpreted in a CSC III case, *Crippen*, *supra*, p 278. The *Crippen* Court applied the plain meaning of the term and found "conceal" defined as "to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging." *Id.* at 283, quoting *The Random House College Dictionary* (1995). The Court then found the defendant had concealed himself when he entered the victim's apartment with his head and face covered and accomplished penetration because she thought he was her fiancé. *Id.* at 284. "The complainant did not knowingly consent to performing sexual acts *with* [the] defendant; only through [the] defendant's concealment of his identity was he able to persuade the victim to submit to his sexual advances." *Id.*

In the instant case, defendant went up to the victim from behind and did not announce himself. He therefore concealed himself as in "to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging." *Crippen*, *supra*, p 283. Under *Crippen*, this is sufficient. Defendant argues, however, that *Crippen* should be read to require some evidence that the concealment was intentional or that the victim did not consent given that the intent to conceal and ill-gotten consent were more obvious in *Crippen*. Requiring proof of non-consent would run afoul of the rule in *Jansson*, *supra*, p 683. Regardless, in the instant case the victim testified that she thought she was consenting to sex with her fiancé, just as in *Crippen*, *supra*, p 284. Furthermore, the trial court found that defendant coming up from behind defendant, and later apologizing to her, was sufficient evidence that the concealment was intentional. As with questions of credibility, questions of intent are left to the trier of fact, and because of the

difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Fennell, supra*, pp 270-271; *People v Avant*, 235 Mich App 499, 506 ; 597 NW2d 864 (1999). Therefore, regardless of how *Crippen* is interpreted, there was sufficient evidence of concealment.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder